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FILED
SEP 7 1960
JAMES R. BROWNING, Clerk

No. 249

In the Supreme Court of the United States

OCTOBER TERM, 1960

MELVIN TANZER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 36-41) is reported at 278 F. 2d 137.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1960 (R. 42). A petition for rehearing was denied on May 31, 1960 (Supp. R. 2). On June 9, 1960, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and includ-

ing July 30, 1960. The petition was filed on July 20, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether one convicted of a narcotic offense, as to whom imposition of sentence had been suspended, was entitled to have the record of conviction expunged on fulfillment of the terms of probation.

2. Whether a conviction on which imposition of sentence had been suspended is a final judgment so as to constitute a prior conviction under the narcotic laws.

STATUTES INVOLVED

21 U.S.C. 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

26 U.S.C. 7237 (c) provides in pertinent part:

> Conviction of second or subsequent offense.
>
> (1) Prior offenses counted.
>
> For purposes of * * * subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), * * * an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which was provided in * * *
>
> (A) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act (21 U.S.C., sec. 174) * * *.
>
> * * * *

STATEMENT

In 1952, in the United States District Court for the District of Arizona, the petitioner pleaded guilty to a charge of violating 21 U.S.C. 174 (R. 3-4; 19-23).[1] On January 26, 1953, the district court adjudged that the petitioner "has been convicted upon his plea of Guilty," suspended the imposition of sentence, and placed the petitioner on probation for three years (R. 22-24).

In March, 1957, after the petitioner had fulfilled the terms and conditions of probation, he was convicted, in the same district court after a jury trial, of violating 21 U.S.C. 173-174, in that he imported and assisted in the importation into the United States

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[1] This violation consisted of receiving, concealing and facilitating the transportation of fifty grains of smoking opium (R. 3-4).

of 29½ grains of heroin (R. 7-8). An information was filed setting forth the prior narcotics conviction (R. 7-8). At the sentencing proceeding on March 11, 1957, the petitioner admitted that he was the same person who had been convicted by the district court for a narcotics offense in 1953, and was sentenced to ten years' imprisonment as a second offender under 21 U.S.C. 174 and 26 U.S.C. 7237 (c), *supra*, pp. 2-3 (R. 8-15).

The petitioner moved in the first case to have the record of conviction expunged on the ground that he had satisfactorily fulfilled the terms of probation (R. 4-5). He also moved in the second case to have the sentence set aside on the ground that the first prosecution did not result in a final judgment which would support a subsequent sentence as a second offender (R. 15-19). The district court denied both motions (R. 6, 25). On appeal, the orders of the district court were affirmed. 278 F. 2d 137.

ARGUMENT

1. The petitioner argues that, since he fully satisfied the terms and conditions of probation following his first conviction in 1953, he is entitled to have that conviction expunged and set aside pursuant to the probation statute, 18 U.S.C. 3651 (Pet. 11-14, 17-18). He relies upon that part of the statute which provides that:

> The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

This language does not, however, mean that, once the terms and conditions of probation are satisfied, automatic expungement of the conviction follows so that the prior conviction may not be considered in determining status as a second offender. It means nothing more than that a defendant who has satisfactorily completed his probationary period may not thereafter be subjected to a fine or other punishment for the offense upon which the probation was based. As the Revisor's Notes to 18 U.S.C. 3651 make plain, the purpose of the language was to insure "certainty as to the extent of defendant's liability * * *."[2] As the court below pointed out, 18 U.S.C. 3651 is not a pardon statute (278 F. 2d at 139). Cf. *United States* v. *Murray*, 275 U.S. 347, 357; *Affronti* v. *United States*, 350 U.S. 79, 83.[3]

2. The petitioner argues that, in any event, the suspension of imposition of sentence in the first pros-

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[2] Some states, such as California, do provide that, on satisfaction of the terms of probation, the defendant may have the conviction expunged, although the California statute itself provides that the conviction remains effective as a prior offense in a subsequent prosecution (Cal. Penal Code 1203.1). The federal statute does not follow that pattern. The petitioner's reliance on *In re Ringnalda*, 18 F. Supp. 975 (S.D. Cal.), involving the effect of the California statute, is therefore misplaced.

[3] The decision in *United States* v. *Mosel*, 26 F. 2d 275 (S.D. Texas), handed down soon after the probation statute was enacted, does contain broad language that satisfactory fulfillment of the terms of probation warrants full discharge of the proceedings, and, where sentence has been suspended, results in no judgment. However, as discussed in Point 2 of the text, it is now clear that suspending imposition of a sentence is itself a judgment on a conviction.

ecution is not a final judgment for the purpose of sentencing him as a second offender. He draws a distinction between the suspension of the imposition of sentence and suspension of the execution of sentence, arguing that the latter represents a final judgment but the former does not. This distinction was rejected in *Korematsu* v. *United States*, 319 U.S. 432, 435, the Court there noting that it was "one of trifling degree," and deciding that in either circumstance there was finality of adjudication.

The first proceeding resulted in a final adjudication of guilt; the petitioner could not again have been tried for that offense. This is simply a case where, after conviction of the first offense, the trial court imposed the "mild and ambulatory punishment" of probation. See *Korematsu* v. *United States*, 319 U.S. 432, 435. That the punishment was mild does not alter the fact that there was a complete and final judicial determination—a judgment—that the petitioner had violated the narcotic laws. After the period of mild punishment had ended, the petitioner was convicted of another offense in violation of the federal narcotic laws.[4] He is therefore a second of-

[4] *Singer* v. *United States*, 278 Fed. 415 (C.A. 3), certiorari denied, 258 U.S. 620, and *Gonzalez* v. *United States*, 221 F. 2d 431 (C.A. 1), relied upon by the petitioner, involved the totally different situations in which the subsequent offender statute was sought to be employed where the commission of the subsequent offense occurred before judgment was rendered on the first offense. Also inapposite is *Schooley* v. *United States*, 4 F. 2d 767 (C.A. 8), which essentially turned on the fact that the first offense was insufficiently pleaded in the indictment charging the subsequent offense.

fender and, as such, is subject to the greater punishment specifically required by Congress in 21 U.S.C. 174 and 26 U.S.C. 7237(c).[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1960.

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[5] The petitioner further contends that, since he was a user, rather than a trafficker of narcotics, the second offender provisions were not meant to apply to him. The petitioner was convicted under 21 U.S.C. 174 for having brought heroin in across the Mexican border. The statute draws no such distinction as he urges.

☆ [illegible] 1960 [illegible]